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IN THE

Supreme Court of the United States

October Term, 1972

No. 73-113

SHIRLEY BUTTOLPH,

Petitioner,

vs.

THE STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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CITATIONS:

Moore v. Illinois, 408 U. S. 786, 92 S. Ct. 2562, 2570, — L. Ed. 2d — (1972).

Sunal v. Large, 332 U. S. 174, 182, 67 S. Ct. 1588, 1593, 91 L. Ed. 1982 (1947).

Lisenba v. California, 314 U. S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166 (1941).

Vandergrift v. United States, 313 F. 2d 93, 96 (9th Cir. 1963).

STATUTES

16 Am. Jur. 2d, Constitutional Law, §§ 544-553.

21 Am. Jur. 2d, Criminal Law, § 220.

STATUTES—Continued

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16A C. J. S., Constitutional Law, §§ 568-569.

28 U. S. C. 1254 (1).

1966 Code of Iowa § 793.18.

IN THE

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SHIRLEY BUTTOLPH,

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THE STATE OF IOWA,

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———o———

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

———o———

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Iowa entered on December 20, 1972.

———o———

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Iowa, sustaining a judgment of the District Court is printed in the Appendix. The Petition for Rehearing of the judgment of the Supreme Court of Iowa was denied on April 18, 1973.

—o—

JURISDICTION

The judgment of the Supreme Court of the State of Iowa was entered on December 20, 1972, and the jurisdiction of this Court to review said judgment is invoked under 28 U. S. C. 1254 (1).

—o—

QUESTION PRESENTED

Was the Petitioner's constitutional right to due process of law violated by the Supreme Court of Iowa when the Court reviewed the record under the vague standards set forth in § 793.18 of the 1966 Code of Iowa as opposed to a review with reference to due process constitutional standards.

—o—

STATEMENT OF THE CASE

The trial jury found the defendant, Shirley Buttolph, guilty of obtaining money by false pretenses. It was the defendant's second trial as the Supreme Court of Iowa has reversed the first trial. On the defendant's second appeal, she asserted as a ground for reversal cumulative trial errors which served, in effect, to unconstitutionally deny her a fair trial under the 14th Amendment to the U. S. Constitution and Article 1, § 9 of the Iowa Constitution. The Supreme Court of Iowa noted that the constitutional attack made on the second appeal was neither voiced in the course of trial, nor raised by a motion for a new trial or in arrest of judgment. The Court held that the issues raised in the course of the trial to which the defendant alluded on appeal did not, individually or collectively, attain such fundamental stature as to dictate a review under the constitutional standards there invoked. The Supreme Court of Iowa chose to review the case under Chapter 793.18 of the 1966 Code of Iowa which states: 793.18 Decision of Supreme Court. If the appeal is taken by the defendant the Supreme Court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse or modify the judgment, or render such judgment as the District Court should have done, or order a new trial, or reduce the punishment, but cannot increase it.

The Supreme Court went on in its opinion to indicate on several different occasions that from a procedural viewpoint counsel had not raised the constitutional issues, and further that the matter in which certain objections were made were improper.

The Court did not review any of the issues raised with reference to a constitutional framework nor did they review the question of whether or not the Petitioner had effective counsel in spite of the fact that there were insinuations in the opinion that at least procedural errors had been made.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the ruling of the Supreme Court of Iowa violated the Petitioner's constitutional rights to due process of law.

The Supreme Court of the United States should rule that when the Supreme Court of Iowa reviews a record in a criminal appeal under Section 793.18, they should consider all claimed errors with reference to a constitutional framework and in the event that it appears from examining the record as a whole that the question of effective assistance of counsel is raised that the record should be reviewed with reference to that question also.

CONCLUSION

For the reasons stated above Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

July 11, 1973

APPENDIX

IN THE SUPREME COURT OF IOWA

(Filed December 20, 1972)

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55281

STATE OF IOWA,

Appellee,

vs.

SHIRLEY BUTTOLPH,

Appellant.

Appeal from Black Hawk District Court—Carroll E. Engelkes, Judge.

Defendant appeals from judgment following her conviction for obtaining money by false pretenses in violation of Section 713.1, The Code, 1966.

AFFIRMED.

Upton I. Kepford, of Waterloo, for appellant.

Richard C. Turner, Attorney General, Robert D. Jacobson, Assistant Attorney General, and David J. Dutton, Black Hawk County Attorney, for appellee.

Heard before MOORE, C. J. and LeGRAND, REYNOLDSON, HARRIS and McCORMICK, JJ.

LeGrand, J.

Following her conviction for obtaining money by false pretenses in violation of section 713.1, The Code, 1966, defendant was sentenced to a term of not more than seven years in the Women's Reformatory. She appeals from that judgment, and we affirm the trial court.

This is defendant's second appeal to this court. She had earlier been convicted jointly with her brother, Dale Armstrong. We reversed that conviction as to both defendants in State v. Armstrong and Buttolph, 183 N. W. 2d 205 (Iowa 1971). On remand the cases were severed and, coincidentally, Armstrong's appeal from his separate conviction on re-trial has also been affirmed today.

Defendant assigns as grounds for reversal the claim that she "did not receive a fair trial and was deprived of due process of law and there was not sufficient competent evidence upon which to base a conviction." This catch-all assignment does not conform to rule 344, Rules of Civil Procedure, which is also applicable to criminal appeals. See State v. Masters, 171 N. W. 2d 255, 257 (Iowa 1969). We expressed dissatisfaction over this same unsatisfactory procedure in State v. Armstrong, — N. W. — (filed December 20, 1972). The criticism voiced there is equally applicable here. The inexcusable failure to comply with our rules does little to assist in the orderly and efficient disposition of the ever-increasing volume of cases with which we must deal.

Our own search of the record and transcript discloses defendant's complaints center around the following alleged errors: (1) permitting evidence to be introduced as to the mental capacity of Stella Brimmer, the victim

of the alleged false pretenses; (2) permitting David Nothdurft to testify as to other similar transactions; (3) refusing defendant's requested instruction concerning the possible issuance of a valid policy of insurance despite the alleged fraud in securing Stella Brimmer's application; and (4) submitting the case to the jury in the absence of competent evidence to show defendant aided and abetted her brother, Dale Armstrong, in the commission of the offense charged.

I. The first three errors listed above are identical with those raised in State v. Armstrong, — N. W. 2d — (filed December 20, 1972). Each was there resolved against the position defendant now takes.

It is unnecessary to repeat what was said in that case. We reject each of the contentions raised and in doing so adopt the holdings in Divisions III, VI and VII of the Armstrong opinion.

II. This leaves for determination the sole remaining issue: Was there competent evidence upon which to convict defendant?

The State charged defendant aided and abetted Dale Armstrong in obtaining money by false pretenses from Stella Brimmer. If she did so, she was, of course, guilty and punishable as a principal. Section 688.1, The Code, 1966. State v. Kittelson, 164 N. W. 2d 157, 164 (Iowa 1969); State v. Horrell, 260 Iowa 945, 948, 151 N. W. 2d 526, 529 (1967).

To aid and abet means to assent to an act or to lend countenance or approval, either by active participation in

it or by some manner encouraging it prior to or at the time of its commission. State v. Barnes, — N. W. 2d — (filed December 20, 1972); State v. Brown, 172 N. W. 2d 152, 155 (Iowa 1969); State v. Kittelson, 164 N. W. 2d 157, 161, 162 (Iowa 1969).

Defendant's principal argument is that there is no evidence to show her knowledge of the alleged crime prior to its commission. Of course, such knowledge is an essential element to be proven by the State. State v. Barnes, supra; State v. Daves, 259 Iowa 584, 586, 144 N. W. 2d 879, 881 (1966). However, it need not be—and frequently cannot be—established by direct proof. It may be either direct or circumstantial. It may be inferred from circumstances surrounding the act. We have said several times participation may be shown by "presence, companionship, and conduct before and after the offense is committed." State v. Barnes, supra; State v. Brown, 172 N. W. 2d at 155; State v. Kittelson, supra, 164 N. W. 2d at pages 162, 163; State v. Horrell, supra, 160 Iowa at 948, 151 N. W. 2d at 529.

With these principles in mind, we review the evidence to see if there is substantial competent evidence of defendant's guilt. In doing so we apply another well established rule—we view the evidence in its light most favorable to the State. State v. Barnes, supra; State v. Brown, supra, 172 N. W. 2d at page 153, and citations.

There was evidence, both direct and circumstantial, from which the jury could find defendant obtained application forms and other material from Wabash Life Insurance Company by falsification, intending to use it for

fraudulent purposes; that she and Dale Armstrong, along with several others, entered into a common plan or scheme to sell policies in that company, knowing they could not legally do so and that the company was not authorized to do business in Iowa; that this practice continued even after the company had ordered defendant to stop it; that frequent and serious misrepresentations were made in the solicitation of the victims, all of whom were elderly persons; that they systematically and regularly met and split the "premiums" collected as the result of their operations, sometimes wrongfully endorsing checks to do so; that all of them from time to time used fictitious names; that in most instances, including this one, the applications were not forwarded to the company nor was any other action taken to secure the issuance of a policy.

The evidence came principally from David Nothdurft, one of defendant's confederates in some of the other transactions. In both the first appeal (State v. Armstrong and Buttolph) and the separate Armstrong case decided today, we held his testimony as to other similar transactions admissible to show defendant's fraudulent intent or motive in the case then being prosecuted. It was admissible for the same purpose in the present case.

In the matter now before us Dale Armstrong secured a signed insurance application from Stella Brimmer and collected from her $6,000 as the "first premium." His modus operandi was identical with that described above. He used a fictitious name, he used insurance materials supplied by defendant, the application contained virtually none of the information required for the issuance of

a policy, and he misrepresented to Miss Brimmer the terms of the insurance she was supposedly buying.

Then, again following the established script, he sought out defendant immediately upon obtaining Miss Brimmer's check and they set out together for Chicago. The check was endorsed by defendant but it was later returned to Miss Brimmer because of information relayed to defendant that the affair was receiving the scrutiny of authorities in Cedar Falls.

Much of this testimony was controverted, and both Armstrong and defendant gave innocent versions of the incriminating circumstances. However, we have set out what the jury *could* find. The denials and explanations do no more than create a dispute of fact for jury determination.

Viewing the evidence together with all its inferences as favorably as possible to the State's case, we find it is not only sufficient, but that it fairly shrieks of defendant's complicity with her brother in the scheme to bilk Stella Brimmer. Defendant is entitled to no relief on the issue raised.

III. We have examined the record and have reviewed the trial transcript with a view toward satisfying our obligation under section 793.18, The Code. We find defendant had a fair trial and we find the evidence of her guilt established beyond any reasonable doubt. The judgment of the trial court is therefore affirmed.

AFFIRMED.

IN THE SUPREME COURT OF THE STATE OF IOWA

Be It Remembered, That on the 18th day of April, 1973, the following proceedings were had, to-wit: Petition for Rehearing.

Appeal from Black Hawk District Court.

No. 55281

STATE OF IOWA

VS. COPY

SHIRLEY BUTTOLPH

ORDER:

Appellant's petition for rehearing in the above entitled appeal is hereby denied. Rehearing is refused.

Done this 18th day of April, 1973.

THE SUPREME COURT
/s/ C. Edwin Moore
Chief Justice

I hereby certify that the foregoing is a full, true and complete copy of the order made by said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 18th day of April A. D. 1973.

G. K. Sappenfield, Clerk.

By ..... Deputy.